NO. 91-636

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

FORT GRATIOT SANITARY LANDFILL, INC.,
Petitioner

vs.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE STATES OF ALABAMA, ARIZONA, DELAWARE, INDIANA, KENTUCKY, OREGON AND VIRGINIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

May a Michigan county, in carrying out its traditional and statutorily mandated obligation to manage locally generated waste, limit privately owned waste facilities in the area to handling only locally generated trash without violating the dormant Commerce Clause of the United States Constitution?

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INTRODUCTION AND STATEMENT OF INTEREST

The amicus states of Alabama, Arizona, Delaware, Indiana, Kentucky, Oregon and Virginia (hereinafter Amici) are states involved in the comprehensive planning and management of municipal solid waste. For a detailed statement of the case, see Respondents' briefs. By way of introduction, however, Michigan, as part of its comprehensive solid waste planning process, requires and delegates to counties the duty to plan, manage and provide for disposal of municipal solid waste. Michigan counties, in carrying out these duties, may, under particular circumstances, determine that disposal capacity in the area be limited to in-area generated waste. St. Clair County has so determined in the instant case.

Amici agree with and fully support the arguments made in the briefs of respondents Michigan Department of Natural Resources and St. Clair County, and in the

arguments of fellow states Georgia, Idaho, Illinois, Montana, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee and West Virginia made in their amicus brief. Amici write separately to additionally emphasize that local control over solid waste planning and disposal does not violate the dormant Commerce Clause, that the waste management process involves control and regulation over waste streams rather than items of commerce, and that disposal facilities can and should be sited by and for those who have generated the refuse which is to go into them. Accordingly, banning out-of-area waste streams does not violate the dormant Commerce Clause.

Additionally, even though the case before this Court could be affirmed on more narrow grounds, this case presents an excellent opportunity for this Court to

revisit and overturn City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). States and localities should not be hamstrung in their solid waste planning and management efforts by fears that enactments will be ruled violative of the Philadelphia holding. To the extent Philadelphia held that a state may not exclude others' waste streams when managing its own municipal waste, the decision should be overturned.[1]

SUMMARY OF ARGUMENT

I.A. Local control over municipal waste is a paradigmatic example of proper exercise of governmental police powers. California Reduction Company v. Sanitary Reduction Works of San Francisco, 199 U.S. 306 (1905); Gardner v. Michigan, 199 U.S. 325

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[1]This brief takes no position on whether a different question is presented when states attempt to exclude hazardous waste streams. Cf. Chemical Waste Management, Inc. v. Hunt, No. 91-471, which case also currently is before this Court.

(1905). The government's need to control trash takes precedence over any purported economic or property interest. Id. Local governments are not required to manage others' trash or create disposal facilities for others' trash. When a locality allows a disposal facility to operate within its boundaries, it directly suffers the burdens associated with disposal. It is not a violation of the dormant Commerce Clause for a local government, in managing its own trash, to permit facilities in its area on condition that they process only local trash.

I.B. The dormant Commerce Clause protects from economic discrimination against outsiders. Court tests emphasize that when economic protectionism is not the purpose or result of local enactments, the local enactments have presumptive validity. Local and state waste management laws do not protect local businesses or consumers, but

rather assure that the locality will be able to accomplish its solid waste management objectives, and therefore are entitled to presumptive validity. Additionally, when the state as a whole makes the decision to grant localities power to exclude out-of-area waste, there are significant in-state interests adversely affected whose participation in the legislative process further adds to the presumption of properly exercised local police power.

II.A. This Court should additionally take advantage of the opportunity presented in this case to overrule Philadelphia v. New Jersey. A clear holding that states and localities which responsibly manage their own trash problems do not thereby violate the dormant Commerce Clause by excluding others' waste streams would facilitate, rather than thwart, solution to the trash problems which beset the nation. Many of the assumptions

contained in the Philadelphia decision are questionable. The Philadelphia majority did not properly analyze or appreciate the nature of a waste stream, and also improperly implied that landfills are scarce natural resources. The purpose of waste stream regulation is regulation, not consumption; the waste in a stream is not a commodity for purchase but a liability which should be managed by those who generated it. Local governments which allow or create disposal facilities within their boundaries do so to address their own waste management responsibilities. Every state is capable of siting such facilities within its own boundaries. Accordingly, when a state limits use of disposal facilities to addressing its own needs, this does not prevent other states from addressing their needs nor infringe on any national values protected by the dormant Commerce Clause.

II.B., C., D. The Philadelphia dissenters correctly recognized that states which accept the responsibility of managing their own trash should not be penalized for doing so by having to take on other states' similar but abrogated responsibilities. The quarantine line of cases provide an example of this principle that police power duties, properly exercised, do not invoke the economic strictures of the dormant Commerce Clause. Additionally, out-of-state waste streams, because they are incapable of the same type of monitoring and regulation as in-state streams, may be excluded without violating the dormant Commerce Clause. Finally, lower court decisions which emphasize that states may exercise monopolistic control over all waste within the state boundary, and market participant decisions which emphasize that landfills are not natural resources undermine Philadelphia's assumptions of interference

with a purported national waste market. In reality there is no national trash market which requires protection, but only local and state streams which have been managed with varying degrees of responsibility by the generators. For the foregoing reasons, this Court should overturn Philadelphia.

ARGUMENT

I. LOCAL AREAS WHICH CHOOSE NOT TO ADDRESS OTHERS' TRASH PROBLEMS DO NOT THEREBY VIOLATE THE COMMERCE CLAUSE.

A. A LOCAL COMMUNITY EXERCISING ITS LEGITIMATE POLICE POWERS MAY PROHIBIT USE OF LOCAL FACILITIES BY OTHERS.

1. Trash Management Traditionally Is A Local Responsibility.

> Control of local sanitation, including garbage collection and disposal . . . is a traditional, paradigmatic example of the exercise of municipal police powers reserved to state and local governments under the Tenth Amendment.

Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), remanded on other grounds, 455 U.S. 931 (1982), subsequently

reaffirmed 742 F.2d 949 (6th Cir. 1984). Besides being a traditional responsibility, state programs such as Michigan's specifically mandate that local governments comprehensively and fully plan for their waste disposal needs. See Michigan Compiled Laws Section 299.425 and .430; see also, e.g., Alabama Code 22-27-47 and -48; Arizona Rev. Stat. Section 49-741; Arkansas Code 8-6-211 and -212; Georgia Code 12-8-31.1; Idaho Code Section 31-4403; Indiana Code 13-9.5-4-1 et seq.; Kentucky Rev. Stat. Sections 224.43-340 and -345; Nevada Rev. Stat. Section 444.510; New Hampshire Rev. Stat. Sections 149-M:13, 15, and 18-19; Ohio Revised Code Sections 343.01 and 3734.52; South Dakota Codified Laws 34A-6-17 and -23; Tennessee Code 68-31-811 through -816; and Virginia Code Section 10.1-1411.

Independent of state mandates and penalties, a locality which does not properly

plan for and supervise its waste disposal is at serious risk should the waste later cause pollution. See, e.g., B. F. Goodrich v. Murtha, 754 F.Supp. 960 (D. Conn. 1991). In effect, the locality responsible for managing and disposing of locally generated waste always retains responsibility, including potential liability, for what happens to that waste. Accordingly, it is incumbent upon the locality to ensure that its wastes are adequately planned for and managed.

In discharging its duty to manage waste, the locality does not just regulate, it controls, monopolizes and dictates how trash shall be handled. The need for total control is obvious. As explained by the Court in Gardner v. Michigan, 199 U.S. 325, 330 (1905), "It is manifest that, were individuals permitted to escape the regulation . . . and dispose of garbage as they severally saw fit, all system in the collection and removal of refuse matter would

be destroyed." (Quoting trial judge). Neither those who generate trash nor those wishing to dispose of it for profit in a manner different from that dictated by the local government can prevent the local government from caring for trash as the local government sees fit. California Reduction Company v. Sanitary Reduction Works of San Francisco, 199 U.S. at 320-23; Gardner v. Michigan, 199 U.S. at 331-33; Hybud Equipment Corp., 654 F.2d at 1192-95. In short, the waste stream which a local government is obliged to manage is not a commodity nor a property nor a product. No one has a right to traffic trash otherwise than as the government allows.

2. Local Governments Are Not Obliged To Provide For Others' Trash Needs.

No government is obligated to take care of another government's trash. Yet, stripped of finery, that is what petitioner demands in this case. Petitioner's argument

is that when a county allows a waste disposal facility to exist within its boundaries, the county may not limit use of that facility to its own waste. Petitioner misunderstands the nature of the powers which a government may exercise in managing its trash problems.

Permits to operate waste facilities are not vested rights, but rather exist at the sufferance of the issuing authority. They contain conditions that the authority deems necessary to protect the public and to carry out governmental obligations. Regardless of his desire to operate, regardless of assurances or even proof that a proposed facility will conform to best management and design practices, a landfill permit seeker cannot demand that his facility be sited. See, e.g., Al Turi Landfill, Inc. v. Town of Goshen, 556 F.Supp. 231 (1982).

The local community is entitled to make its resources available primarily to serve its own needs. When a local community

franchises garbage collection, for example, it is not required to provide pickup service for other localities' trash. See Swin Resource Systems, Inc. v. Lycoming County, 883 F.2d 245, 251 (3rd Cir. 1989). Similarly, when a community allows a landfill to be sited and operate within its boundaries, it may insist that as a condition of existence the facility address only local needs.

Under the Michigan statutes challenged here, a community charged to manage its trash may create landfill space even contrary to what would be permitted under local planning and zoning enactments. See Mich. Comp. Laws Section 299.430(4). This demonstrates both the importance of the planning aspect at issue here and the legitimacy of the police power being exercised. The community creates disposal space to meet local disposal needs. This government created "market" in trash disposal

services is not unconstitutionally infringed upon when a community limits provision of services to addressing its own needs. To hold otherwise would frustrate the very purpose for the local planning and creation of landfill space.

In this created government landfill "market" no private company is forced to provide services against its will. Companies are free to evaluate the terms upon which localities seek their assistance. Companies also are not precluded from seeking as much trash business from as many municipalities as desire private enterprise to assist them in carrying out their obligation to dispose of trash. Petitioner's real complaint is that he does not like the terms on which the local government wishes to do business with him. Petitioner's remedy is to cease to do business with St. Clair County. Nothing in the Commerce Clause compels counties to site landfills within their boundaries for

purposes which the landfill operators deem are in the landfill operators' best interests.

3. Communities May Limit Disposal Facilities To Handling Their Own Trash.

Additionally, when a community chooses to manage its waste needs by siting a facility within its own boundaries, it directly suffers the burdens associated with such facilities. See generally, Comment, "Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Post-Industrial 'Natural' Resources, and the Solid Waste Crisis," 137 U. Pa. L. Rev. 1309, 1328-36 (1989); cf. Swin Resource Systems, 883 F.2d at 253-54 and note 3 (difficulty involved in siting facilities implies a need to allocate costs associated with those facilities).

Contrary to Petitioner's assertions (see Petitioner's brief at 45), even heavily regulated landfills are hardly safe. In promulgating the new EPA regulations which

Petitioner asserts take away harm associated with trash, the agency made clear that its minimum standards were designed to reduce harm, not eliminate it. See 56 Fed. Register 50982 (Oct. 9, 1991) (leachate from current municipal landfills as toxic as from hazardous waste sites); id. at 50983-84 (EPA has discretion to balance financial cost of total protection against potential harm, and set minimal requirements that reduce harm to what EPA considers acceptable level, when balanced against financial cost). Landfills remain a justifiably undesired health and safety threat to communities in which they are sited.

Furthermore, the serious burdens associated with trash which a community itself did not generate are often beyond that community's ability to regulate. Although this point will receive further attention later in this brief (see infra II.C.), it is worth emphasizing here that a community where

a landfill is sited cannot police distantly generated trash to make sure that toxics are minimized. Other communities which fail to accept burdens associated with a total waste stream (by shipping waste elsewhere for ultimate disposal) have abrogated their duty to fully manage and take responsibility for the problems of waste they generate. Those who fully manage their waste streams and allow waste to be buried in their backyards need not be burdened with the waste problems of others. Just as the Commerce Clause does not compel a community to accept waste burdens which others refuse to bear, the Commerce Clause also does not prevent a community from allowing landfills in its boundaries on condition that they serve only local needs.

B. LIMITING LOCAL LANDFILLS TO LOCAL WASTE DOES NOT INFRINGE ON ANY NATIONAL VALUES PROTECTED BY THE COMMERCE CLAUSE.

The above arguments at I.A. demonstrate that there is no national market in trash, but rather numerous local waste streams subject to the complete management of local governing bodies, including disposal at facilities and on terms which the local governments determine. See also II.A. infra. Even assuming arguendo that there were a national trash market, however, allowing localities to exclude themselves from it would not violate established dormant Commerce Clause principles.

1. There Is No Economic Protectionism When Localities Provide For Disposal Of Only Their Own Trash.

Setting aside the issue of whether there is a need in our federal system for the dormant Commerce Clause scrutiny which the Court has fashioned out of the silences of the Constitution (see, e.g., Redish & Nugent,

"The Dormant Commerce Clause and the Constitutional Balance of Federalism," 1987 Duke L.J. 569; cf. Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue, 483 U.S. 232, 259-60 (1987) (Scalia, J., dissenting) (dormant Commerce Clause cases are quagmire and make little sense)), one of the supposed virtues of the dormant Commerce Clause is its protection of outsiders from the economic protectionism which a state otherwise might engage in to favor its own. New Energy Co. v. Limbach, 486 U.S. 269, 273 (1988). The primary purpose of Court Commerce Clause scrutiny, therefore, is to determine whether a state's enactments were intended to promote economic protectionism. Cf. Regan, "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause," 84 Mich. L. Rev. 1091 (1986).

Since purpose cannot be directly divined, the Court has adopted "short cuts" and "tests" to help determine when improper

economic protectionist purpose might be present. Thus the Court properly may look behind stated purpose for actual effect to determine if the stated purpose is a sham. See, e.g., Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951). In situations where the effect is to withhold produced consumer commodities from national markets, the Court assumes that the purpose is economic protectionism and places the burden on the state to justify the discrimination. New Energy Co. v. Limbach, 486 U.S. 269, 278-79 (1988). Even in such situations, however, if the state can demonstrate legitimate exercise of police power, the enactment will stand. E.g., Maine v. Taylor, 477 U.S. 131 (1986). But in situations where economic protectionism is not the effect, the state enactment is presumed valid, even though it may have significant side effects on private markets. E.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456

(1981). In both situations, the key inquiry is whether the legislation is aimed to benefit in-state economic interests by burdening out-of-state competitors. New Energy, 486 U.S. at 273.

In the situation before this Court, there simply is no economic protectionism. No consumer goods or production resources are withheld from national markets. Petitioner is not an out-of-area manufacturer or processor, but rather the only representative of his industry allowed to operate in the locality. Petitioner's income and profits are derived from the fact that St. Clair County allows him to accept its waste. This is a strange sort of economic protectionism which benefits directly the person who complains of it.

Furthermore, when a locality permits disposal within its boundary of only its own trash, this usually raises the cost of disposal for the local citizens. Cf. 56 Fed.

Reg. 50987 (smaller landfill volume causes higher cost to consumers). Those who choose to accept in their community the burdens associated with disposal of their own trash not only assume detrimental environmental and health effects involved with siting and operation but also the economic cost associated with decreased economies of scale. Being thus burdened as a result of shouldering trash responsibilities can hardly be labelled economic protectionism.

2. There Is No Discrimination Against Interstate Commerce When Localities Treat All Out-Of-Area Waste The Same.

Another way the Court ensures that economic protectionism is not the purpose of a state enactment is to look for virtual representation. The dormant Commerce Clause protects outside economic competitors potentially harmed when the state favors its own industrial interests. The theory is that, absent the compulsions of the dormant

Commerce Clause, a state might have no reason to listen to the voices of those adversely affected by tariff-like measures, since these persons are not the state's constituents. Accordingly, this Court has long opined that when there are significant in-state interests adversely affected by a local enactment, this raises the presumption that the local enactment was not adopted with discriminatory purpose, but to serve legitimate local goals. See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 472-73 & n. 17; South Carolina State Highway Dept. v. Barnwell Brothers, Inc., 303 U.S. 177, 185-87 (1938). A statewide system of waste management such as Michigan's, which delegates to localities the ability to accept or not accept out-of-area waste, has built into it such in-state protections against discriminatory purpose.

When a state such as Michigan grants localities the power to restrict local

disposal facilities to processing only in-area waste, every other locality inside or outside of Michigan is treated exactly alike. This is sufficient for Commerce Clause purposes. Bill Kettlewell Excavating, Inc. v. Michigan Dept. of Natural Resources, 931 F.2d 413, 418 (6th Cir. 1991); Evergreen Waste Systems, Inc. v. Metropolitan Service Dist., 820 F.2d 1482, 1484-85 (9th Cir. 1987). It can be presumed that there are counties within Michigan which desire to export their trash burdens and which are adversely affected by local restrictions on incoming waste. When a locality decides that it does not have or does not desire excess capacity to manage more than its own needs, the focus is not upon whether the waste originated in Poughkeepsie, Pocatello or Detroit but rather upon how the locality can best manage its own needs and preserve quality of life in the area. Michigan counties which otherwise would export waste

to their neighbors and thus avoid full trash management responsibilities can be presumed to have spoken during the legislative process which resulted in the statutes challenged here. Additionally, it should not be assumed that the waste industry lobby is without power to influence the Michigan legislature or that members of that lobby are all out-of-staters.

3. In Summary, Local Control Is Distinguishable From Philadelphia's Facts and Holding.

Petitioner's response to the arguments of Kettlewell, Evergreen and the above paragraph is vigorous but misplaced reliance upon Dean Milk v. City of Madison, 340 U.S. 349 (1951). The footnote upon which appellant hangs his argument does no more than reaffirm that when it can be determined that the purpose of local legislation is to protect local industry at the expense of a larger national market, the presence of

in-state persons also theoretically discriminated against does not save the enactment. In the instant case, economic protectionism does not exist. See supra I.B.1. Additionally, in Dean Milk the enactment was local rather than a part of specific statewide authorization. As explained above (see I.B.2.), when the state program grants localities ability to exclude out-of-area waste, this means other areas which would desire to export their waste have had input in that legislative enactment. No state directive to plan for local milk inspection was involved in the Dean Milk case.

The purpose of the dormant Commerce Clause is to protect against economic favoritism, not to thwart properly exercised local police powers. When a locality fully manages its own waste problems by permitting disposal within the locality of area generated waste, this does not violate Philadelphia v. New Jersey. The goal,

purpose and effect of local control is responsible waste disposal rather than economic protectionism. The presence of in-state interests adversely affected also serves as presumptive confirmation that waste management was indeed the raison d'etre for the enactments.

II. THE COURT SHOULD FURTHER, HOWEVER, TAKE ADVANTAGE OF THIS OPPORTUNITY TO LIMIT OR OVERRULE PHILADELPHIA V. NEW JERSEY.

The factual situation before this Court is significantly distinguishable from what this Court faced in Philadelphia v. New Jersey, and the decision of the Sixth Circuit can be affirmed without this Court having to overrule Philadelphia. Nevertheless, Amici respectfully submit that it is time to reconsider the Philadelphia logic and holding.

Philadelphia holds only that discrimination against out-of-state waste on a statewide basis without significant state need or reasonable basis for treating

out-of-state waste differently violates the dormant Commerce Clause. Nevertheless, Philadelphia has been championed by some as standing for the proposition that government may not interfere with trash that travels across state lines for profit. See, e.g., Matter of Recycling & Salvage Corp., 586 A.2d 1300, 1308-11 (N.J. Super. A.D. 1991) (court rejects industry contention that regulations which inhibit free flow of commerce violate Commerce Clause); Kovacs & Anderson, "States as Market Participants in Solid Waste Disposal Services - Fair Competition or the Destruction of the Private Sector?" 18 Envtl. Law 779, 803-05 & n. 71 (contention that state should not be allowed to displace private enterprise when acting as market participant); cf. Borough of Glassboro v. Gloucester County Board of Chosen Freeholders, 495 A.2d 49, 56 (N.J. 1985) (rejecting argument that Commerce Clause may

be used as sword to obtain preference).[2]

The "Hobson's choice" (see 437 U.S. at 631) referred to by (now) Chief Justice Rehnquist in his Philadelphia dissent has become even more poignant with the additional possibility of Section 1983 liability, should a state or locality manage and accept trash burdens but find that in doing so it has violated a court's interpretation of the Philadelphia case. See Dennis v. Higgins, ___ U.S. ___, 111 S.Ct. 865 (1991)

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[2]Amicus NSWMA similarly attempts to use the Commerce Clause as sword rather than shield when erroneously contending that local governments create unfair economic conditions by excluding out-of-area waste. See NSWMA Amicus brief at 24-25. No disposal facility is compelled to accept any terms offered by a community. See supra I.A.2. A truly "free" market would, in fact, allow a community burdened by the activity of landfilling to negotiate the terms on which it will accept others' burdens. What NSWMA and Petitioner really desire is to control to their own advantage the costs of both in- and out-of-state disposal by prohibiting, under guise of Commerce Clause scrutiny, communities from assessing whether it is in their own economic and health and safety interests to accept out-of-area waste.

(suits for violation of the Commerce Clause may be brought under 42 U.S.C. Section 1983); C & A Carbone, Inc. v. Town of Clarkstown, 770 F.Supp. 848, 852-53 (S.D.N.Y. 1991) (Section 1983 suit brought in waste context).

As the proliferation of cases in recent years indicates, Philadelphia seems to have spawned rather than ended controversy about what steps a state may take to regulate or control waste without violating the dormant Commerce Clause. See Cox, "Burying Misconceptions About Trash and Commerce: Why It Is Time To Dump Philadelphia v. New Jersey," 20 Capitol Law Review 813, 815-17 & nn. 4-7 (1991) (citing cases). Several commentators have argued that the Philadelphia decision is out of keeping with proper dormant Commerce Clause analysis. See, e.g., Cox, supra (proper understanding of nature of waste streams and disposal sites, and of government's obligation to manage waste, implies Philadelphia was

wrongly decided); Maltz, "How Much Regulation Is Too Much - An Examination of Commerce Clause Jurisprudence," 50 Geo. Wash. L. Rev. 47, 72-74 (1981) (Court's failure properly to link problems of waste with purpose of landfills led to wrong decision); cf. Johnson, "Beyond City of Philadelphia v. New Jersey," 95 Dick. L. Rev. 131, 150-54 (1990) (Philadelphia should not be read to prohibit freezing interstate waste flow to serve legitimate state planning needs; flexible and deferential test should be applied to such enactments); Note, "Recycling Philadelphia v. New Jersey," supra, 137 U. Pa. L. Rev. at 1311-37 (states should be given loose rein in addressing solid waste problems since this promotes true values of federalism without burdening any national values protected by Commerce Clause).

Amici respectfully submit that it is time to wipe the slate clean, overrule Philadelphia v. New Jersey, and declare that

when states or localities responsibly manage their own trash problems, they do not violate the dormant Commerce Clause by excluding other states' or localities' waste streams from their boundaries.

A. THERE IS NO TRASH "MARKET" WHICH DESERVES COMMERCE CLAUSE PROTECTION.

The Philadelphia majority never fully analyzed or appreciated the nature of a waste stream. Instead, the Philadelphia majority improperly likened waste to a consumer commodity and treated landfill sites as if they were scarce natural resources. Both of these comparisons do violence to the unified nature of a waste stream and the generating government's obligation properly to manage and dispose of its waste.

1. Waste Streams Are Not Competitively Produced, and Local Governments Create Disposal Facilities On The Basis Of Community Need Rather Than To Protect Local Industry Or Consumers.

The Philadelphia majority improperly likened waste to a commodity withheld to "prop up" locally produced similar goods and thereby protect local industry. Cf. Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977) (out-of-state apples burdened so that North Carolina apples will have competitive advantage with consumers); Dean Milk, supra, (banning out-of-area milk protects local milk processors from competition by out-of-area processors). Waste streams, however, are not goods produced for export but rather obligations which only find their way into other states' boundaries because the community or state of origin chose not to accept the burdens associated with ultimate disposal. Dormant Commerce Clause violations simply do not

occur in such situations.

The typical dormant Commerce Clause case involves a state placing restrictions on foreign competitors (or removing restrictions from local producers) in order to benefit local businesses against outside competition. See, e.g., Bachus Imports Ltd. v. Dias, 468 U.S. 263 (1984) (local liquor not taxed, so it can build market share against foreign competition); Baldwin v. G.A.F. Seelig, 294 U.S. 511 (1935) (foreign milk not permitted to undersell local milk). Waste stream situations do not involve competition among industries located in different states. Every locality and state is responsible for managing its own waste problems, and any technology (e.g., incineration, recycling, refuse-derived fuel, landfilling) developed by industry located in any state is freely available to all the states as a choice for dealing with waste problems. In the instant case it does not

matter to St. Clair County or Michigan where the Ft. Gratiot company is headquartered, chartered or incorporated or who derives profits from its operations; what matters is whether the facility is needed and how much facility is needed.

Petitioner's claim that he constitutionally may not be restricted in the amount of waste business he wishes to do is based on a false assumption that because he wants to engage in extra business, the business thereby is protected commerce. The Philadelphia majority similarly begged the question of what if any waste "commerce" is worthy of protection by summarily concluding that waste is an article of interstate commerce. See 437 U.S. at 621-23. The real question should be whether a private operator can force the existence of a limitless trash market against a state's will, when the state wishes to have the operator assist it on a more limited scale in carrying out a

government obligation. When the government's focus, as here, is on addressing its trash needs, restrictions on customer base are legitimate, reasonable and incidental burdens on this artificial "commerce" which other states have chosen not to responsibly manage.

2. Disposal Sites Are Not Natural Resources.

The Philadelphia Court also went astray in likening the fact situation before it to cases which involve a state's attempted hoarding of a natural resource. See 437 U.S. at 627-28. No state has a monopoly on landfill sites or other disposal technology. Just as important, any scarcity of disposal facilities existing at a particular time is an artificial rather than natural resources condition. Political factors and pressures prevent disposal facility siting rather than unavailability of geologic resources. See Swin Resource Systems, 883 F.2d at 253-54.

As has been previously noted (see

supra I.A.2. above), governments create landfills when they grant permits for their construction and operation. Because of the health harms associated with solid waste disposal, the main cost of a landfill is the construction of the facility. A landfill is not primarily the land upon which it operates, but the engineered phenomenon of liners, leachate collection systems, and highly regulated operating conditions.[3] The permit which a government grants to construct and operate a landfill is not like a permit to extract coal, move water or hunt

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[3]Amicus NSWMA effectively concedes this point at pp. 9-10 of its brief. Contrary to other NSWMA assertions (see id. at p. 6), however, the EPA regulations do not impose onerous siting requirements. See 56 Fed. Reg. 51002-51004. Amici know of no state which does not have currently developable land which would meet EPA's location requirements.

game.[4] There is no fixed number of potential geologically suitable landfill sites.

In the landfill context the government's permitting decisions completely create a disposal facility where none previously existed and at a spot which was not inherently destined to be a landfill. There is no finite limit on how many such facilities may be created, and every state has similar ability to create such facilities within its own boundaries. This is not a situation of Texas and Oklahoma keeping their own oil, Pennsylvania and West Virginia keeping their own coal, and California hoarding its produce. Cf. West v. Kansas

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[4]Yet in even these quite different situations of allocation of limited resources the Court has indicated that when the government program for conservation of the resources indicates that the goods are something more than happenstance this may hel defeat a Commerce Clause attack. Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 955-5 (1982).

Natural Gas Co., 221 U.S. 229, 255 (1911). Since each state can create as much disposal capacity as it desires, the natural resources line of cases is simply inapposite when assessing waste streams.

3. Disposal Is A Uniquely Local Rather Than National Problem.

The Philadelphia Court also incorrectly implied that waste stream problems require national solutions, when in reality sanitation concerns are best addressed at the state and local level. The Philadelphia majority's statement at the end of its opinion that "one state [may not] isolate itself in the stream of interstate commerce from a problem shared by all" (437 U.S. at 629) simply is not correct. There are many problems shared by state and local governments across the nation which affect interstate commerce and which do not require, under dormant Commerce Clause scrutiny, forced participation with other states in

solving their particular parts of the problem

Education problems are "shared" by most states, but no one seriously argues that one state must provide for another state's education needs. Cf. Swin Resource Systems, 883 F.2d at 251, n. 2. Crime is a problem shared by most communities and states, and one which impacts commerce, but no one would seriously argue that a state or community which failed adequately to provide for its own citizens' protection has a right to demand that other communities or states provide it police, rehabilitation, jail or community service resources. Similarly, managing garbage is a local and state government responsibility. Because it is a responsibility which all local and state governments experience, this does not mean that those governments which fail to provide disposal facilities within their own boundaries should be allowed under guise of dormant Commerce Clause protection to foist

their burdens upon others who have adequately addressed their waste needs.

B. PHILADELPHIA'S DISSENT CORRECTLY RECOGNIZED THE NATURE OF THE TRASH PROBLEM.

(Now) Chief Justice Rehnquist correctly analyzed the problems faced by a state which wishes to address its own solid waste problems but does not wish thereby to take on everyone else's solid waste burdens. If the state is not given power to exclude others' waste problems, it is faced with a "Hobson's choice." 437 U.S. at 631.

There continues no "safe" way to dispose of solid waste. Cf. 437 U.S. at 630 (no safe disposal method at time of Philadelphia decision). Accordingly, every government legitimately wishes to exercise its police powers to protect its citizens and its environment from the degradation associated with solid waste disposal, incineration or other methods of waste

management/elimination. If Philadelphia truly holds that a state must either prohibit all disposal operations within its boundaries or accept waste from all the rest of the United States for any facilities which it allows to operate within its boundaries, this is a Hobson's choice. See 437 U.S. at 631.

As has been set forth in greater detail in the Pennsylvania amicus brief, many states today, in contrast to the lax attitude which prevailed at the time of Philadelphia v. New Jersey, are seriously addressing and managing their solid waste problems. When this responsible and comprehensive planning results in disposal within the state's boundaries, this should not mean that the state is thereby forced to become a dumping ground for other states which do not as responsibly or completely manage their waste. As (now) Chief Justice Rehnquist correctly noted:

> The fact that New Jersey has left its landfill sites open for domestic waste does not, of course, mean that solid waste is not innately harmful. Nor does it mean that New Jersey prohibits importation of solid waste for reasons other than the health and safety of its population. New Jersey must out of sheer necessity treat and dispose of its solid waste in some fashion, ... It does not follow that New Jersey must under the Commerce Clause, accept solid waste . . . from outside its borders and thereby exacerbate its problems.

437 U.S. at 633.

The quarantine line of cases cited by Chief Justice Rehnquist in his dissent provides adequate support for statewide bans involving garbage, but the Chief Justice's dissent also correctly recognizes that the stakes involved in statewide solid waste management and planning are potentially larger than temporary quarantines involving a limited number of diseased cattle. The quarantine cases are consistent with a theory of dormant Commerce Clause analysis which allows states to exercise their police powers to carry out legitimate government duties

without having to address other states' similar problems. Garbage management is such a government responsibility. To the extent that Philadelphia v. New Jersey prohibits a state from conditioning disposal permits to serve solely state needs, the decision should be overturned.

C. THE LACK OF CONTROL POSSIBLE OVER OUT-OF-STATE WASTE STREAMS JUSTIFIES DISPARATE TREATMENT OF THOSE STREAMS.

The Philadelphia majority also improperly assumed (apparently because New Jersey improperly conceded) that there are no differences between out-of-state and in-state waste streams which justify disparate treatment. In reality, because waste streams are streams rather than commodities, the fact that one stream remains totally in-state while another crosses state boundaries is itself a difference in kind justifying disparate treatment.

As has been previously noted (see

supra I.A.1.) waste management is a government responsibility. The monopoly control which government may exercise over a waste stream serves several functions, including ensuring that no improper waste enters the stream, that disposal habits are changed so that only certain types of waste enter the stream (e.g., recyclables and compostables removed), and that the waste is handled and transported all along the stream so there is the least possible damage to health and environment. An intrastate waste stream may be regulated, inspected and controlled from point of generation to point of disposal. A waste stream which originates out of state cannot be easily inspected or controlled by the state which will receive ultimate disposal burdens.

When the disposal state's primary concern is minimizing environmental harm by eliminating toxic or noxious contents, it is possible to rigorously inspect close at

home. Such inspection is not just of the physical waste stuff within the stream, but also of the process of waste generation itself. It is control over what goes into the stream which is most important in reducing the risk of improper disposal. Whereas a disposal state can regulate its own waste generators, it cannot impose such control over out-of-state generators. Not only might it be considered an infringement upon another state's sovereignty for a disposal state to insist that its waste inspectors monitor activity at all out-of-state generation sites, such efforts would also likely prove to be cost and manpower prohibitive.

The disposal state may legitimately insist, however, that only waste streams which have been fully and completely regulated according to the standards, and by the personnel, of the disposal state be entitled to disposal within the disposal

state. Effectively, such regulation bans out-of-state generated streams. By more directly authorizing a ban of out-of-state generated streams, this Court would recognize the legitimate health and safety concerns associated with such streams. A state which does not have control over the complete waste stream should not be placed at risk by that waste stream.

Alternatively, if the purpose of state regulation is to affect disposal habits by encouraging recyclying, waste reduction, etc., it is equally difficult to impose such values on an out-of-state generated stream. Nevertheless, when a state creates landfill space on condition that only waste which has been through a certain amount of recycling, waste reduction, etc., is accepted for disposal, the disposal state has a right to ensure, by imposing its own standards and conducting inspections by its own personnel, that such conditions have been met at the

point of generation. Out-of-state generated streams never are capable of satisfying such rigorously imposed disposal state requirements. This Court should frankly recognize that allowing a ban on out-of-state generated streams merely recognizes that the disposal state does not have power to impose the same type of controls over waste others generate that it may impose over wastes which are its own inherent responsibility.

D. LOWER COURT DECISIONS CORRECTLY ALLOWING TREMENDOUS STATE CONTROL OVER WASTE STREAMS DEMONSTRATE THE WEAKNESS OF PHILADELPHIA'S HOLDING.

Petitioner concedes that a state may act under protection of the "market participant" doctrine and prohibit disposal of out-of-state waste at any state-owned facilities. See petitioner's brief at 10. Accord, e.g.: LeFrancois v. Rhode Island, 669 F.Supp. 1204 (D.R.I. 1987). In the waste context, however, there is no sharp distinction between state-owned disposal

facilities and private facilities, since private facilities come into existence only when the state determines the facility is needed. Additionally, the state has such control over the conditions of operation, construction and other landfilling costs that it may effectively limit or eliminate private competition.

Nevertheless, a state-owned landfill which is the only permitted facility in the state and which subsidizes its operations for the benefit of its state residents does not violate the dormant Commerce Clause when it restricts access to its facilities only to in-state trash. LeFrancois, supra. In other words, even though the state-owned landfill may be the only game in town, it is still entitled under the case law which petitioner concedes is valid to market participant exemption.

The market participant landfill cases additionally explicitly recognize that

landfills are not natural resources. See, e.g., Swin Resource Systems, 883 F.2d at 254; LeFrancois, 669 F.Supp. at 1211. Since hoarding a natural resource might void the market participant exemption to the dormant Commerce Clause, the market participant cases carefully scrutinized the nature of disposal facilities in a way which the Philadelphia majority did not. Cf. 437 U.S. at 627-28 with Swin Resource Systems, 883 F.2d at 251-55. Philadelphia's unthinking analogy to cases involving preferred right of access to natural resources is contradicted by the lower court decisions, in the market participant context, which have determined in the context of a fully developed record that landfills are not natural resources. These lower court decisions indicate the Philadelphia majority misunderstood the nature of the waste problems it was attempting to analyze.

Numerous lower court decisions also

authorize statewide monopolistic control over waste similar to that which the Court sanctioned at a local level in California Reduction and Gardner v. Michigan. See, e.g., J. Filiberto Sanitation, Inc. v. New Jersey Dept. of Envtl. Protection, 857 F.2d 913 (3d Cir. 1988) (state may require processing and disposal at certain facilities); Harvey & Harvey, Inc. v. Delaware Solid Waste Authority, 600 F.Supp. 1369 (D. Del. 1985) (state may direct all in-state waste to specific in-state facilities); cf. In Re Long-Term Out-of-State Waste Disposal Agreement, 568 A.2d 547 (N.J. Super. A.D. 1990) (state may prohibit long-term contract with out-of-state facility and require development of in-state disposal capacity). The courts in these cases correctly have reasoned that a state may completely remove itself from whatever interstate trash market otherwise would exist in order to fulfill state goals of various

types. See generally, Cox, supra, 20 Cap. U. L. Rev. at 838-44 (collecting and analyzing cases).

But to paraphrase the Philadelphia majority: "It [should] not matter that the State has shut the article of commerce inside the State in one case and outside the State in the other." 437 U.S. at 628. A disposal state's decision that for economic and health and safety reasons it must prohibit out-of-state waste from entering landfills located within its boundaries is entitled to the same type of respect as a decision by a generating state that it will withhold waste from a supposed interstate market in order to promote economic and environmental concerns.

The market participant and flow control cases correctly have determined that states which manage their waste streams from point of generation to disposal do not in so managing or regulating violate the dormant Commerce Clause, even though such control

eliminates the possibility of participation for the waste involved in any national market. The cases reaffirm the notion that waste management is a sovereign state responsibility. The implied message of the cases is that states which do not fully assume this sovereign responsibility have nothing to complain of when states which do shoulder their burdens thereby remove their states from a "market" which is artificially created by those states which fail to manage their own waste. Accordingly, the lower court decisions throw into question any reading of Philadelphia which prohibits a state that cares for its own waste from banning other waste at its borders.

CONCLUSION

For all the foregoing reasons, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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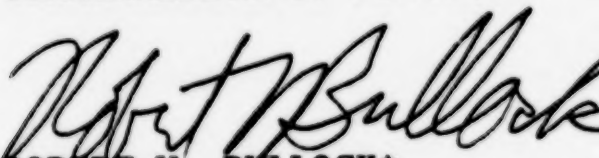

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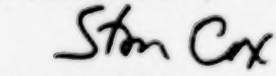

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